

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 vs. CRIMINAL NO. CR-08-1669 JB

6 RICHARD ANTHONY MCKENZIE,

7 Defendant.

8 Transcript of Motion Hearing before The Honorable
9 James O. Browning, United States District Judge, held in
10 Albuquerque, Bernalillo County, New Mexico, commencing on
11 Thursday, February 10, 2011, at 10:08 a.m. and concluding at
12 10:55 a.m. Proceedings recorded by mechanical stenography;
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1 THE COURT: Good morning, everyone. I appreciate
2 everyone making themselves available to me this morning.

3 All right. The Court will call United States of
4 America versus Richard Anthony McKenzie, Criminal Matter
5 08-1669 JB.

6 If counsel will enter their appearances.

7 MR. MARTINEZ: Good morning again, Your Honor. Damon
8 Martinez on behalf of United States.

9 THE COURT: Mr. Martinez, good morning too you.
10 And for the defendant?

11 MR. COOPER: Good morning. Robert Cooper on behalf
12 of Mr. McKenzie, and he is present this morning.

13 THE COURT: All right. Mr. Cooper, good morning to
14 you.

15 Mr. McKenzie, good morning to you.

16 THE DEFENDANT: Good morning, Your Honor.

17 THE COURT: All right. We're here on the defendant's
18 motion to compel NCIC records.

19 Mr. Cooper, if you wish to speak in support of that
20 motion.

21 MR. COOPER: Thank you. Before we begin, may we have
22 the marshal remove the right hand --

23 THE COURT: Any problem with that?

24 All right. We'll do that, then.

25 Thank you. Appreciate it.

1 MR. COOPER: Thank you, Your Honor.

2 THE COURT: Mr. Cooper.

3 MR. COOPER: May it please the Court?

4 THE COURT: Mr. Cooper.

5 MR. COOPER: Thank you, Judge.

6 Counsel.

7 Judge, the Court has already ruled on our motion to
8 suppress. Subsequent to that, we filed a motion to reopen the
9 suppression hearing and we requested a Franks hearing. This
10 morning I understand the Court has submitted a memorandum with
11 regard to that, so that matter has been resolved.

12 When we filed this motion to compel production of
13 NCIC records, what we were seeking was any requests that were
14 made to NCIC between the dates of July 2nd, 2008, through
15 July 7th, 2008. We wanted the requests made of NCIC so that we
16 could determine whether or not when Agent Hyland went to the
17 train station he had already received information that
18 Mr. McKenzie had a criminal history.

19 And we did that for two reasons. We filed the motion
20 for two reasons, Your Honor. It's stated in our motion that,
21 one, we wanted to -- the motion to reconsider the suppression
22 hearing and the motion for a Franks hearing had not been
23 decided yet. We wanted to supplement the record with regard to
24 this particular issue with regard to that motion, and we also
25 wanted to obtain that information because we felt that it was

1 material to the issues at trial. In particular to the
2 impeachment of Agent Hyland.

3 Judge, during the February 18th, 2010, suppression
4 hearing, Agent Hyland testified that he did not run an NCIC
5 check on Mr. McKenzie. The Government referred to that portion
6 of the testimony in its -- in its response. That was at page
7 12, lines 23 through 25, page 13, lines 1 through 8.

8 Furthermore, there was testimony during the
9 February 18th, 2010, suppression hearing about the case of
10 United States of America versus Travis Denny. In that case,
11 Your Honor, Agent Hyland and two other agents received
12 information that on March -- well, on March 17th, 2004,
13 defendant in that case, Mr. Denny, was a passenger aboard an
14 Amtrak train arriving in Albuquerque from Los Angeles. Prior
15 to their encounter with the defendant, the agents checked his
16 reservation information, much as they did with Mr. McKenzie.
17 The check revealed that on the day prior to the train's
18 departure the defendant purchased a one-way ticket from
19 Los Angeles to Newark, New Jersey.

20 Agents also ran a criminal history check on the
21 defendant and found prior drug-related convictions. According
22 to the NCIC report, the defendant had been released from the
23 New Jersey prison system in 1998. Based on the foregoing
24 information, the agents believed that the defendant might be a
25 drug courier and decided to contact him.

1 That happened in the Denny case in 2004, Your Honor.
2 We think that someone at DEA ran an NCIC on Mr. McKenzie prior
3 to any contact with him at the bus station here in Albuquerque.

4 At the hearing on February the 18th, 2010,
5 Mr. Padilla, his then-counsel, never asked if anyone else ran
6 an NCIC on Mr. McKenzie prior to Agent Hyland going to the bus
7 station. As such, Your Honor, I think the Court might have
8 been left with the impression that the NCIC was not run on
9 Mr. McKenzie that day.

10 Judge, credibility is not measured only by what is
11 said in court, but also what is not said. And I think in part
12 the question -- the question just was not asked as to whether
13 or not an NCIC was run. We believe it was run. We believe it
14 has been the practice of DEA since at least the Travis Denny
15 days to run an NCIC to determine whether or not someone who
16 purchases a ticket with cash or just prior to the date of
17 travel, someone who purchases a ticket that is much more
18 expensive than otherwise, those people -- not all of those
19 people are contacted at the bus station, but we believe those
20 people, if they have prior drug convictions, are.

21 So, Judge, that's why we filed the motion to compel
22 the production of the NCIC records. We would like for this
23 Court to issue an order compelling the United States not to
24 determine whether or not it was filed, but actually to --
25 themselves to obtain the request of -- or the documentation for

1 any requests during the relevant period, or, alternatively, to
2 order NCIC to provide that information to us, Judge.

3 We want that information, again, to supplement the
4 record on the motion to suppress. We understand that the
5 decision has been filed. I have not read it, but we would like
6 to supplement that record.

7 And additionally, Agent Hyland is the chief witness
8 at trial in this matter, and I believe the information that we
9 may obtain from NCIC regarding the requests that were or were
10 not made are relevant and material to Mr. McKenzie's trial. I
11 think they will allow us to perhaps impeach Agent Hyland.

12 Thank you, Judge.

13 THE COURT: Thank you, Mr. Cooper.

14 Mr. Martinez, if you wish to respond to the motion.

15 MR. MARTINEZ: Yes, Your Honor.

16 THE COURT: Mr. Martinez, let me ask you this. I'm
17 inclined, given-- given the way I have denied the request for a
18 Franks hearing and to reopen the suppression hearing, not to
19 think that this material is relevant to those issues or to
20 anything else we're doing at trial, but I think Mr. Cooper,
21 without using the words, is also saying that it may be Giglio
22 material, if, in fact, the information turns out that the
23 DEA -- or that Mr. Hyland did do an NCIC request.

24 Would you be willing to do this? Would you be
25 willing to look at the NCIC to see if any requests were made

1 during this period of time, and then if, in fact, something was
2 done, produce that as part of your obligations to produce
3 Giglio material?

4 MR. MARTINEZ: Your Honor, if that's the Court's
5 wish.

6 THE COURT: Do you see a flaw in my analysis?

7 MR. MARTINEZ: Well, Your Honor, if I can back up. I
8 understand what the Court is saying, I understand the Court's
9 request. The core of my standing before you today is that I am
10 an officer of the court and I, hopefully, appreciate that
11 responsibility every time I stand before a judge in one of
12 these courts.

13 Your Honor, at this point, I have no indication that
14 Agent Hyland testified wrongly, falsely when he testified at
15 this hearing.

16 I will proffer to the Court right now that it's my
17 understanding that not only did Agent Hyland not do an NCIC
18 check, that an NCIC check was not done. If it's the Court's
19 wish that I further investigate this, obviously, I will be
20 compliant with that wish, Your Honor.

21 THE COURT: Well, is your ability to make the
22 representations based upon conversation with Mr. Hyland --

23 MR. MARTINEZ: Yes, Your Honor.

24 THE COURT: -- your own sort of investigation, or did
25 Mr. Hyland go back and look at the NCIC, talk to people? Have

1 you and Mr. Hyland exhausted this issue?

2 MR. MARTINEZ: My sense of the way you're saying
3 "exhausted," no, Your Honor. My understanding is in speaking
4 to Mr. Hyland.

5 Your Honor, there is a basic trust that I have in
6 conversations with this case agent and I try to have with all
7 case agents. Unless I see something which causes a flag for
8 me, I believe in that trust.

9 At this point, there's nothing to indicate that what
10 we have represented to this Court is wrong.

11 Now, the hesitation I have, Your Honor, is, what I
12 see possibly developing here is a slippery slope, where -- If
13 the defendant gets his foot in the door on this, where does
14 that stop in looking for possible cross-examination material
15 going into trial?

16 And let me just use -- Let me take this -- Let me
17 take this slippery slope to an extreme, Your Honor. Agent
18 Hyland testified that he'd been an agent for so many years.
19 That testimony is as relevant as this issue here today. Going
20 to trial, this is not one of the things that's going to lead to
21 one of the elements -- decisions in one of the elements. It's
22 something that has been said in court. But concerning the
23 issue that's before this Court and what was decided this
24 morning as far as the motion to suppress, the Franks issue, can
25 the defendant then ask for his transcripts from school to

1 determine whether he testified correctly about his
2 law-enforcement experience, about his training? Where does it
3 stop, Your Honor?

4 THE COURT: Do you know if Mr. Hyland is stating --
5 and I think he really said it in the suppression hearing, as
6 well -- that he didn't order the -- any NCIC search? What has
7 he done, if you know, to make, also, the representation that no
8 one else at DEA did the search arrest?

9 MR. MARTINEZ: Well, it's my sense, Your Honor, was
10 that he was the person that was, for lack of a better word, in
11 charge of this case at that time.

12 THE COURT: So he doesn't know of anybody -- He was
13 never told somebody else has done a search and what the
14 contents of it were?

15 MR. MARTINEZ: No, Your Honor.

16 Now, Your Honor, if I -- I'm sorry. I want to make
17 sure that I answer the Court's question.

18 THE COURT: Well, I think you did. I guess I might
19 ask another question. You may or may not want to answer it.
20 But has he done something since this issue about the NCIC
21 search was brought in this motion -- has he done anything
22 further to make determination?

23 MR. MARTINEZ: No, Your Honor. I did not request him
24 to look into it further. Basically, I confirmed that what we
25 were representing is accurate, and that's the way we walked

1 into today's hearing.

2 THE COURT: All right. All right. Anything further
3 in response to the motion, Mr. Martinez?

4 MR. MARTINEZ: Yes, if I could, Your Honor.

5 THE COURT: You may.

6 MR. MARTINEZ: I guess if I could just respond to the
7 defense counsel's argument.

8 As I stated in the motion, and the way that the
9 United States views this, is this is basically just a fishing
10 expedition, and there's no basis for it. The defense counsel
11 says that the question wasn't asked by the previous defense
12 counsel whether somebody else asked -- whether someone else did
13 this search -- this NCIC search, but, Your Honor, I can't tell
14 you how many hearings I've flipped back on and I've reviewed
15 and I wished that I would have asked one more question or a
16 series of questions. This is just a regret after the action.

17 Right now where this case stands, the Court has
18 clearly stated that the issue concerning suppression is over.
19 As of the opinion this morning, the Court has definitely ruled
20 on the Franks issue, too.

21 And, Your Honor, these matters have been put to bed
22 at this point and it's time to move forward to the trial.

23 Now, in making this request that the defense counsel
24 has made, I would just point the Court to Rule 16. Aside from
25 the Giglio issue, aside from the Jencks issue, Rule 16 governs

1 what the defendant is entitled to. Now, in the -- under the
2 (a) subsection, this is -- in no way entitles him to this under
3 Rule 16, and, in fact, I would point the Court to information
4 not subject to disclosure, and that specifically would be
5 (a)(2), which is except as provided previously, this rule does
6 not authorize a discovery or inspection of reports, memoranda
7 or other internal government documents made by an attorney for
8 the Government or other government agencies.

9 So, getting to the point of arguendo, Your Honor,
10 even if this had been done, which I'm not saying it was, it is
11 irrelevant, it is irrelevant to the trial that is upcoming, and
12 the only way that it would be relevant is if I believed that
13 Agent Hyland had not been truthful on the stand, and then I
14 would have a duty, an affirmative duty to turn that over to
15 defense counsel.

16 So what he is requesting, he has no proper basis for
17 the request, and we respectfully ask that this Court deny it.

18 THE COURT: All right. Thank you, Mr. Martinez.

19 Mr. Cooper, anything further on your motion?

20 MR. COOPER: If I may, Your Honor.

21 THE COURT: Mr. Cooper.

22 MR. MARTINEZ: Your Honor, may I just point -- I'm
23 sorry. If I could just real quickly point out a distinction.

24 THE COURT: Sure.

25 MR. MARTINEZ: I'm sorry I forgot this. Defense

1 counsel brought up the issue of Travis Denny, the case in which
2 Agent Hyland testified -- or was involved before and was asked
3 questions about at the suppression hearing. The way that that
4 case can be distinguished from this case is, in that case Agent
5 Hyland had NADDIS information and he also had time to do that
6 background check. And that's what's different from this case.

7 THE COURT: You said had what?

8 MR. MARTINEZ: The NADDIS information, which is
9 the -- I'm not even sure what the acronym stands for, but it's
10 the law enforcement database.

11 THE COURT: All right. And was that case -- Did that
12 involve a stop based upon the profile, or was it a consensual
13 stop?

14 MR. MARTINEZ: Your Honor, if I may have a moment?

15 THE COURT: All right.

16 (A conference was held between Mr. Martinez and Agent
17 Hyland.)

18 MR. MARTINEZ: Your Honor, it was a train case, and
19 it was a consensual encounter. Again, I would just proffer
20 that because the person had been in the criminal system before
21 he was in the computer database, there was information on that
22 person, Mr. Travis Denny, and I would proffer that Agent Hyland
23 had the time to do that background check before going to the
24 train station.

25 THE COURT: I guess I've gotten a little lost in what

1 the relevance of this case is. And I guess I can ask
2 Mr. Cooper this.

3 Are they arguing that in that -- in that case, the
4 Tenth Circuit or whatever the opinion was, indicated that
5 Mr. Hyland did a background check, and then Mr. Cooper and
6 Mr. McKenzie are using that to say that shows that it may have
7 occurred in this case? Is that the relevance of the case?

8 MR. MARTINEZ: Well, that's the way we're
9 understanding it, Your Honor. That's the understanding I'm
10 taking from defense counsel's argument. But again, our
11 position is it's not relevant.

12 THE COURT: And your saying that Mr. Hyland did it in
13 that case because he had time to do it?

14 MR. MARTINEZ: And because that defendant had
15 previously been in the criminal justice system, so his
16 information was in NADDIS, National --

17 Do you know what it stands for?

18 NADDIS, Narcotics and Dangerous Drugs Information
19 System.

20 THE COURT: All right. And is that a simpler -- Is
21 that a simpler database that DEA has quick access to; it
22 doesn't have to go through NCIC? Is that --

23 MR. MARTINEZ: My understanding is that it's a
24 subcomponent of NCIC.

25 Can it be looked at that way?

1 MR. HYLAND: It's just another database.

2 MR. MARTINEZ: Okay. So I stand corrected. It's
3 another database from NCIC, Your Honor.

4 THE COURT: And is it something that just the DEA
5 has, for example?

6 MR. HYLAND: I think other agencies do, also.

7 MR. MARTINEZ: I would assume that agencies within
8 the Department of Justice, Your Honor. I'm not sure Homeland
9 Security would be privy to it.

10 THE COURT: Anything further, Mr. Martinez?

11 MR. MARTINEZ: No, sir. I'm sorry to take some time
12 away from defense counsel.

13 THE COURT: All right. Mr. Cooper.

14 MR. COOPER: Thank you, Judge.

15 Mr. McKenzie's been in the criminal justice system
16 previously, as well.

17 Back to the Travis Denny case, that's exactly why I'm
18 using it, Judge. In that case, they received information that
19 Mr. Denny was traveling from Los Angeles to Newark, and they
20 received -- he -- the agents checked his reservation
21 information. They learned that on the day prior to departure
22 he purchased a one-way ticket from Los Angeles to Newark. They
23 had that information from looking at his ticket information.
24 When they saw that, they then said, Ah-hah, let's run a
25 criminal history check on the defendant.

1 Mr. Hyland -- Agent Hyland testified, Your Honor,
2 that they had that information, but when you read the Travis
3 Denny case you can't tell whether or not he, himself, requested
4 it, but it's clear that -- from the opinion, that the agents in
5 Travis Denny had run a criminal history check on the defendant.
6 It doesn't say that they had an NCIC, it doesn't say that they
7 had NADDIS. We don't know what sort of criminal history check,
8 but they ran a criminal history check on this individual, and
9 all they had was his reservation information.

10 At the hearing on February the 18th, 2010, at page
11 12, Counsel, line 23, Mr. Padilla asks this question -- number
12 of questions, and the answers were given by Agent Hyland.

13 "Question: And, sir, in this particular case involving
14 Mr. Richard McKenzie, after receiving information -- that is,
15 the information about Mr. McKenzie from the PNR -- did you run
16 the name through NCIC?

17 "No.

18 "And that has been a procedure used in the past, has
19 it not, by Drug Enforcement Administration?

20 "Answer: Well, I know you need personal identifiers
21 to run an NCIC computer check. You can't just run a name.

22 "But it has been done in the past, has it not?

23 "Answer: I think it has been, yes."

24 At that hearing, Your Honor, we were led to believe,
25 from Mr. Hyland's testimony, that you needed personal

1 identifiers to run an NCIC computer check. But it had been
2 done in the past. We think it had been done, according to the
3 opinion, in United States versus Travis Denny at 441 F.3d 1220.

4 So, Judge, what we're asking for is that information
5 to show whether or not that request was made. I think it's not
6 going to cost anything, it's not going to cost -- or take a lot
7 of time. It is a very easy request to make. They make that
8 request, and they can then be told who made any requests during
9 the applicable time period. And, Your Honor, that, you're
10 absolutely, correct, would be Giglio material.

11 I think it's going to show that you can run an NCIC
12 with just the name, as they did, perhaps, in Travis Denny and
13 we think in this case.

14 So, again, I would ask that that information be
15 produced.

16 And while we're at it, maybe I should have framed
17 this motion to ask for any NADDIS inquiry that may have been
18 made prior to having contact that day at the train station,
19 with Mr. McKenzie, because it's -- it's clear to us that they
20 had some criminal -- they had some criminal history -- some
21 information concerning Mr. McKenzie's criminal history when
22 they went to the train station.

23 Thank you, Judge.

24 THE COURT: What is it that makes that clear to you?

25 MR. COOPER: Judge, there are -- According to the

1 Travis Denny testimony -- or Agent Hyland's testimony in Travis
2 Denny, DEA agents make 80 to a hundred drug interdictions on
3 Amtrak per year. We believe that there are a lot of tips that
4 come to DEA, and the way they ferret out who they're going to
5 go down and talk to is by running that criminal history. A lot
6 of people buy tickets in Los Angeles and Flagstaff, all along
7 the way to the East Coast, and we -- we just -- we believe,
8 Your Honor, that that is what happened, and DEA has to have
9 some way to ferret out the cases that are going to yield some
10 drugs, and I think that's how they do it.

11 THE COURT: All right.

12 MR. COOPER: I'm not sure that really answered your
13 question, but thank you, Judge.

14 THE COURT: All right. Thank you, Mr. Cooper.

15 Well, I'll take this under advisement, but I'm
16 inclined to agree with the United States, that there just
17 doesn't seem to be any evidence that Mr. Hyland lied on this
18 point or any other to call into question his credibility. You
19 know, if I thought there was some reason to doubt his veracity
20 on this point, then I might ask the United States to
21 double-check to just make sure this doesn't become Giglio
22 material, but I think Mr. Martinez makes a good point, that
23 people testify to a lot, and it begins to be just fishing to
24 try to uncover some exculpatory evidence, and so I'm inclined
25 not to make that request.

1 The Government's on notice that this is an issue for
2 the defendant, and if it turns out down the road that there was
3 some NCIC check, then -- and they didn't produce it, then it
4 may be cross-examination material that wasn't produced, but I
5 don't think that on this record I can really begin to require
6 the Government to start checking out every statement that
7 Mr. Hyland made to see if there's some support or basis for it.

8 I continue to think this information isn't relevant.
9 I will run it through my head again, but I think that I
10 still -- after working through the material that we had on the
11 motion for the Franks hearing, it appears to me that the track
12 the Court has gone is that this was a consensual stop, and so
13 it's all kind of interesting how we got there, but police all
14 the time do investigations and then develop their evidence from
15 a consensual stop, so I'm not sure that this evidence would be
16 relevant at trial.

17 I don't think it would be relevant at the suppression
18 hearing. I don't think we need a Franks hearing, and so on the
19 basis of the record before the Court it just doesn't appear to
20 be relevant to anything we're doing. So I'm inclined to deny
21 it, but I'll take a look at it.

22 I may look at the Denny case -- I will look at the
23 Denny case before I issue my opinion just to see if that
24 influences me to think that there's some doubt as to
25 Mr. Hyland's testimony, but I don't think that's going to be

1 enough, given that every case is somewhat different. They
2 might order an NCIC or some other criminal background in one
3 case but not another.

4 All right. Is there anything else that we need to
5 discuss while we're together? Is there anything else I can do
6 for you?

7 Mr. Martinez?

8 MR. MARTINEZ: No, Your Honor.

9 THE COURT: All right. Mr. Cooper?

10 MR. COOPER: I don't have anything else, Your Honor.

11 THE COURT: All right. All right.

12 Mr. McKenzie, did you want to say something to the
13 Court?

14 THE DEFENDANT: Yes, I do. May I sit down?

15 THE COURT: You may.

16 THE DEFENDANT: The issue that I want to bring up,
17 that I've always wanted to bring up, when I had Alonzo Padilla
18 as my attorney and now Mr. Cooper and at the December 1st
19 hearings, which should make it more relevant, is that I always
20 want to attack the PNR report on its own.

21 THE COURT: The what?

22 THE DEFENDANT: PNR report. My contention is that my
23 Fourth Amendment violation didn't start with the initial
24 encounter with Officer Hylander (sic). I've always contested
25 that my Fourth Amendment violation started the way in which he

1 got the PNR. And the reason why I say that is because, based
2 on my investigation, I've seen that over the years -- well, the
3 cases that I have seen -- oh, have come across this case that's
4 been argued in front of Judge Parker, and one of the issues
5 that came up in the 1992 case involving Santana Romero Dottery
6 was that at one time that the task force officers was using an
7 administrative warrant to get copies of the training manifest.

8 And then after more research I found an article
9 entitled "Amtrak Helps DEA Hunt Drug Couriers," and in that
10 article it speaks about how the DEA had direct access -- well,
11 had a computer on their desk that had a direct access to the
12 terminal at Amtrak.

13 And what I wanted my investigator to do, as well as
14 my attorneys, is that to investigate and see why that practice
15 stopped. Because in the memo it speaks of the DEA agent is
16 speaking directly on how they did have ties directly to the
17 computer, and at some point in time that has stopped.

18 And my point is that if you use -- if you take away
19 the information in the PNR, we've got to deal with
20 probabilities. And what would the probabilities be of Agent
21 Hylander (sic) seeking me out that day in a train that had over
22 360 people in it and I was in the sleeper car?

23 And during the hearings when asked about the tape
24 recorder, what he said is that he would cut his tape recorder
25 on and he would start in the coach and start from the beginning

1 and walk through and ask questions. I understand that.

2 Now, in my situation, in all the cases that's been
3 used against me as far as the drug-courier profile, all the DEA
4 agents, whether it's the airport or the train station, was in a
5 remote location and they seen the characteristics of the
6 defendant and then they approached them, and then later on they
7 subpoenaed, or whatever they did, they found out the travel
8 itinerary.

9 My case is totally different from all those cases.
10 One, I never paid for my ticket. As stated in my own warrant,
11 as well as their own -- as well as the hearing, my ticket was
12 paid for by a third-party person, which her name was Ruby
13 Johnson. She paid for the ticket. The only thing I did was
14 secure my ticket; meaning that once the ticket agent -- gave my
15 ID, and then I gave -- I was given my reservation. There was
16 no conversation ever said.

17 Now, the point I'm trying to make is that in the case
18 that you presided over, which was U.S. versus Sanchez, you gave
19 the opinion of what constitutes a confidential source or
20 tipster, and one of the things -- the word that you used was
21 "generic." And I believe that the reason why you're denying --
22 or you're considering the fact that this was a casual encounter
23 is because you're giving weight to the PNR. Because the
24 factual findings, the first three or four pages, all it goes
25 to -- it goes into detail of how I paid for my ticket and the

1 one-way travel and the car and the fact that Officer
2 Hylander (sic) spoke to a ticket agent. Without the PNR
3 report, he never would have known who I was.

4 THE COURT: Well, I think everybody agrees with that.

5 THE DEFENDANT: So my thing is that in dealing with
6 the Fourth Amendment, I feel as though my violation is
7 occurring on the fact on how he obtained his PNR report,
8 because how would you be able to -- or how could we test the
9 veracity, which is the credibility or reliability of an
10 informant when he doesn't even himself know who the informant
11 is?

12 Then you have an officer, by the name of Gerald
13 Perry, who comes in and tries to give credibility to the PNR
14 report when he is tainted. I have a case right here of People
15 versus Rangel, where he is now going through a situation where
16 he's committed perjury. It's a big motion, where the person
17 did a 2255, was that Officer Perry, that he deliberately lied,
18 it was proven that he lied. So what relevant credibility could
19 this Officer Perry have given to the weight of this PNR report?

20 And you heard testimony from my investigator where he
21 says that the ticket agent does not deal with the DEA directly.
22 Not only that, I have contacted on my own, through my own
23 research, a lady by the name of Mrs. Kimberly Hill, who was the
24 assistant attorney who works at the head corporation for the
25 Amtrak. And what she says is right or wrong, but what I'm

1 saying right now is that the ticket agents have protocols, they
2 have numbers of people who to contact if something is afoot.
3 And these people are internal Amtrak agents.

4 I'm going to concede the argument that Alonzo first
5 put up about Amtrak being a federal entity. I want to give it
6 the status of being a corporation. And in doing so, how does
7 an officer -- not only my information, but by your stipulation,
8 which is paid by credit card -- how does he receive that
9 without an administrative warrant, which is at least a subpoena
10 or warrant?

11 Because, like I said, I want to go to probabilities.
12 Without that he would never have known I was coming through
13 Albuquerque, New Mexico. I was on the second floor in a
14 sleeper car with 360 people, so without that PNR report he
15 would never have discovered me, let alone known who I was that
16 day. And what I'm saying right now is that that was
17 obtained -- Now he's moving further and further away from it by
18 saying that it was in an envelope.

19 So what I'm saying is that, how does my or my
20 friend's personal information get into an envelope in the DEA's
21 office when the only means that it could have got there was by
22 the agent that I dealt with, and he says he didn't deal with
23 the DEA.

24 And even if he was to see any type of characteristics
25 of a drug-courier profile he has a contact number that he is

1 authorized to contact. It's not the DEA. It's the Amtrak
2 police.

3 And in the same argument with Judge Parker, it says
4 that usually Amtrak police accompanies the DEA if something's
5 afoot. I was never -- I was never approached by the Amtrak
6 police. I was approached strictly by the DEA, who says that he
7 used -- in his own words -- he got a PNR report. He doesn't
8 know who he got the PNR report from. So how can we even begin
9 to give credibility to the PNR report?

10 And that's why I feel that my Fourth Amendment
11 violation was violated at and the way and the means in which he
12 got the PNR report without a warrant, a subpoena, let alone an
13 administrative warrant.

14 That was my contentions. I always want to attack
15 that as a basis of my violation. Not the encounter, not the --
16 not starting from me smoking a cigarette on the platform, but
17 for me -- but for the fact that he obtained information
18 illegally. I believe that the PNR report he obtained was
19 obtained illegally.

20 The warrant starts off with information from the PNR
21 report. And without that you have nothing else. Without the
22 PNR report, you don't have the probabilities of him finding me
23 or talking to a ticket agent or seeing me on the platform. And
24 like he said, he cut the tape recorder on before he saw me.
25 That's why I believe that he did an NCIC on me, because the

1 train --

2 Another thing I want my investigator to do, because
3 on that train there was a family reunion and the majority of
4 people on that train were African American, especially in my
5 car. And if my investigator would have did his job, that would
6 be relevant, too. Because how do you pick me out of 360
7 people, saying that I had a golf shirt, when I in actuality had
8 a T-shirt. A golf shirt has three buttons, and I had a T-shirt
9 on.

10 You approach me, you cut the tape recorder on, and
11 then you engage in a conversation based on the PNR report that
12 I feel was obtained illegally.

13 And during the hearing was, when asked about the PNR
14 report, you move further and further away. At first you said
15 you reviewed the passengers' name manifest. Then when asked,
16 "How did you get it?" you said you got it from a ticket agent.
17 That's his words in the transcription.

18 Then the prosecutor stood up and objected and said
19 that -- a confidential source. He tried to stick verbatim, but
20 couldn't state it. How does a prosecutor know better than the
21 officer how he obtained a PNR report?

22 And then when asked about getting it directly from
23 the fax machine, when my investigator gets on the stand and
24 speaks about the fact that there's no way in the world that
25 this person who I dealt with, which I know who I dealt with,

1 never sent it.

2 Now you say you got it from an envelope. That's --
3 How does -- I can't -- With no cover sheet, with no note, not
4 even -- All right. Even if this confidential source is getting
5 monetary value, how would you seek him out to pay him if you
6 never spoke to him before, during or after? You don't know who
7 it is. How would you pay this guy? How would you refund him
8 or reward him for information that he sent when you, yourself,
9 don't even know who he is?

10 That's why I'm so eager to go to trial. I'm not
11 scared to go trial. I want to go to trial, because I want to
12 see who the Government puts on this stand as this person who is
13 credible, who sends the information. And not that -- Let
14 alone, you said the piece of paper -- that the piece of paper
15 is a printout. There's no note attached to it that my name is
16 such and such, this is what I saw, this is what I believe, on
17 how I was trained to look for. You have no indication of
18 anything. No notes, nothing attached to the PNR report. The
19 subpoena by itself. That's always been my argument.

20 And for some reason my lawyers have not -- was not --
21 I guess was not understanding me or I guess they didn't -- they
22 seen it wasn't relevant. I think it's very relevant. I feel
23 as though my Fourth Amendment violation started from obtaining
24 this PNR report that he can't explain how he got it.

25 THE COURT: Let me do this. You've raised -- You've

1 pointed out a number of legal authorities. Before I issue my
2 opinion and order on this request, I will review these. I'll
3 get a transcript from Ms. Schutte Everett and get those
4 authorities and take a look at them before I issue the opinion
5 and order.

6 THE DEFENDANT: The only reason I bring this up is
7 because I see that you're -- the reason why you're ruling
8 against me, because you give credence to this PNR report. And
9 I don't understand how you can have an informant or
10 confidential source that you can't even check. And even if --
11 The prosecutor says in his own -- one of his replies that, Your
12 Honor, give credence to this informant, trust the fact that we
13 have an informant, but we're not going to bring him to court
14 anyway.

15 Now you're going to violate my Fifth Amendment
16 rights, my rights to face my accuser, but now I can't face the
17 person who says that I fit some type of profile? That's
18 basically what you're saying. You're saying that, give
19 credence to the fact that there is an informant on this case,
20 even though Hylander (sic) doesn't know who it is. Just give
21 credence to the fact that there is an informant. As a matter
22 of fact, if McKenzie does go to trial, we're not going to bring
23 him, anyway.

24 THE COURT: Well, we're certainly going to -- the
25 Court's going to do everything it can to protect your right to

1 confrontation at the trial, so I'll work -- I'll keep these
2 comments in mind, and, you know, I can't really do a whole lot
3 on that until I see what the Government's going to call -- who
4 it's going to call, and we'll certainly -- the Court will do
5 everything, I'm sure Mr. Cooper will, too, to protect your
6 rights at trial.

7 I think we're -- at this stage, though, we're just
8 trying to determine whether this information is relevant to any
9 issue at trial, and also whether it's relevant to the issues
10 of, you know, a Franks hearing or reopening the suppression
11 hearing, those sorts of things.

12 Take a look at my opinion. I'll take a look at your
13 authorities that you've given here. I'll get a transcript from
14 Ms. Schutte Everett, and before I issue the opinion I'll take a
15 look at it.

16 THE DEFENDANT: Yes. The only thing I want to say is
17 that, my contention has always been that I wanted to attack the
18 PNR report by itself. Like I said, I'll tell you right now, I
19 could scream from the mountain tops what happened. I'm not
20 trying to challenge was it a consensual encounter or whether it
21 was an investigative stop.

22 I know that if you give credence to PNR report, then
23 that goes either way, whether you rule on that the way which
24 you did or how it was. That's not my argument. My argument is
25 that I want to do a probabilities, the fact that PNR report

1 that was used in this situation was illegally obtained. I
2 don't have to -- It's not an SNL letter, which is a security
3 letter, that he handed to the Amtrak and then they released my
4 information. Because I don't understand -- I was arrested. I
5 had a phone on me, a BlackBerry. They used a subpoena or
6 warrant, which I have in my discovery, to obtain my phone
7 records. And if T-Mobile is a private company, why wouldn't
8 the same hold true for my personal records dealing with Amtrak?

9 Just now Hylander (sic) used an affidavit warrant to
10 get the phone records from Amtrak about whether the
11 confidential source or informant sent the PNR report to the
12 DEA. If that's -- Why wouldn't he just call his informant and
13 have the informant send that? Why did he have to use a warrant
14 or subpoena to get that information, but when it comes to my
15 personal information, which, like I say, was used by a credit
16 card -- my ticket was secured by a credit card and -- All you
17 have is the computer readout.

18 I mean, if this ticket agent, who I dealt with,
19 didn't send it, who else illegally accessed this computer?
20 Because they had to have accessed it illegally to get my travel
21 information or how I paid for my ticket, which I didn't pay
22 for. Why wasn't Ruby Johnson, the person who paid for the
23 ticket -- why wasn't she investigated? Because I didn't pay
24 for it. All I did was use my ID to secure the ticket.

25 Another thing I asked my investigator to do, as well

1 as my lawyer, is to look into Amtrak's announcement and
2 monitoring policy. Like, what is their policy with somebody
3 who purchases a ticket over the phone or by credit card? Is
4 there a safeguard? Can anybody just look at the computer and
5 get that information?

6 Because it seems like if he did, he just grabbed the
7 information without a subpoena or warrant. What is Amtrak's
8 announcement policy or monitoring policy when somebody buys a
9 ticket over the -- on the computer? Because, evidently, the
10 person who could qualify as the informant didn't send that PNR
11 report. He testified to that.

12 And, like I said, I spoke to Kimberly Hill. She's in
13 charge of corporate. I've got her number right here if you
14 need it. She says that there is a policy or there is checks
15 and balance. What they do, they have contact numbers that
16 these ticket agents use when something's afoot, and one of
17 those numbers is not the DEA.

18 And you heard from my own -- from my own -- from my
19 own -- excuse me -- from my own -- from my investigator, which
20 all adds up.

21 Another thing, too. How is an -- Arizona is in the
22 Ninth District. Why are DEA agents in Albuquerque arresting
23 people who are buying tickets in Arizona and coming through
24 here? Why wouldn't Arizona have wanted that arrest? They had
25 enough time to approach me in Arizona. Why are they

1 approaching me in a whole other state or a whole other
2 jurisdiction?

3 Which I think a whole other argument comes into
4 place. Interstate commerce. How is my information being faxed
5 over a computer to a whole other state? And you're using that
6 information as a precursor, as a cornerstone, a foundation to
7 approach me.

8 And my attorneys are not -- are failing to bring this
9 up. They act like this whole thing started from me being on
10 the platform smoking a cigarette. No. It was a chain of
11 events that happened before that. And they all advised -- I
12 feel it was a violation of my Fourth Amendment rights based on
13 how they got this information, which is the PNR report, which
14 they can't account for.

15 THE COURT: Okay. I think I understand your
16 position, and I'll look at the authorities you've given before
17 I issue the Memorandum Opinion and Order.

18 THE DEFENDANT: Thank you, Your Honor.

19 THE COURT: All right.

20 MR. MARTINEZ: May I be excused, Your Honor?

21 THE COURT: Mr. Martinez?

22 MR. MARTINEZ: May I be excused?

23 THE COURT: Yes. I appreciate everyone's assistance,
24 and y'all have a good afternoon.

25 (Court stood in recess at 10:55 a.m.)

C-E-R-T-I-F-I-C-A-T E

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Danna Schutte Everett, RPR, CCR, CRR, Official Court Reporter for the State of New Mexico, do hereby certify that the foregoing pages constitute a true transcript of proceedings had before the said Court held in the City of Albuquerque, New Mexico, in the matter therein stated.

In testimony whereof, I have hereunto set my hand on this 14th day of March, 2011.

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